

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Mark Acton, Vice Chairman;  
Nanci E. Langley; and Robert G. Taub

Alplaus Post Office  
Alplaus, New York

Docket No. A2012-88

PUBLIC REPRESENTATIVE ANSWER IN OPPOSITION  
TO UNITED STATES POSTAL SERVICE MOTION  
TO DISMISS PROCEEDINGS

(December 21, 2011)

The Public Representative hereby answers in opposition to the Postal Service's motion to dismiss Commission proceedings concerning an appeal of a Postal Service decision to close the Alplaus, New York Community Post Office.<sup>1</sup> The Postal Service proposes to close the Alplaus Community Post Office (Alplaus CPO) by January 6, 2012.<sup>2</sup>

On November 29, 2011, the Commission received correspondence from postal customer Andy Gilpin requesting a review of the Postal Service's decision to close the

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<sup>1</sup> See United States Postal Service Motion to Dismiss Proceedings, Docket No. A2012-88, December 14, 2011 (herein Motion to Dismiss).

<sup>2</sup> The recent Postal Service decision to delay the closing or consolidation of any Post Office until May 15, 2012 may apply here. United States Postal Service Notice of Status of the Moratorium on Post Office Discontinuance Actions, December 15, 2011.

Alplaus CPO.<sup>3</sup> On December 14, 2011, the Commission instituted a proceeding under 39 U.S.C. § 404(d)(5) and established the above referenced docket to consider the Petitioner's appeal. On that same date, the Postal Service filed its Motion, arguing that the closure of the Alplaus CPO by terminating its contract "falls outside the scope of 39 U.S.C. § 404(d)(5)" and that "the Commission lacks subject matter jurisdiction." Motion at 1. Accordingly, the Commission "should dismiss the appeal." *Id*

For the reasons stated below, the Commission should deny the Postal Service's Motion to Dismiss and review the decision to close the Alplaus CPO on its merits, as requested by the Petitioner.

### ARGUMENT

The Postal Service's argument consists of two parts: legal and policy. With respect to the former, the Postal Service argues that the Commission lacks jurisdiction under 39 U.S.C. § 404(d) to consider an appeal of a Postal Service decision "to terminate a contract governing the operation of a non-Postal Service operated retail facility." *Id.* at 2. Moreover, the Postal Service asserts that section 404(d) does not apply "to the operation of a retail facility whose existence derives solely from the terms and conditions of a voluntary contract." *Id.* [Citation omitted] In support of its argument, the Postal Service relies on the definition of a "post office" drawn from other Postal Service documents, including United States Postal Service Handbook PO-101 and regulations. 39 C.F.R. § 241.3(a)(2)(i). *Id.*

The Commission is again being asked to decide the threshold issue of whether a community post office is a "post office" as that term is used in section 404(d). This issue has been previously decided by the Commission in Docket No. A83-30 (Knob Fork, West Virginia).<sup>4</sup> There, the Commission considered the question of whether "the

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<sup>3</sup> See Letter of Andy Gilpin, November 21, 2011 (herein Petition).

<sup>4</sup> See Commission Opinion Remanding Determination for Further Consideration 39 U.S.C. § 404(b)(5), Docket No. A83-30, January 18, 1984 (herein Knob Fork).

39 U.S.C. § 404(b) procedure must be followed before the Postal Service decides to close a Community Post Office (CPO).” *Id.* at 1. The Commission’s opinion in Knob Fork concluded “that section 404(b) does apply,” thereby causing the Postal Service’s decision to be set aside because it was made “without observance of procedure required by law.”<sup>5</sup>

The Commission should follow its precedent established in Knob Fork and dismiss the Postal Service’s most recent Motion concerning the Alplaus CPO. The applicable procedures that require Postal Service notice and opportunity for persons affected by the closure or consolidation of a post office to comment included in former 39 U.S.C. § 404(b)(5) remain applicable today. Those procedures of notice and opportunity for comment were incorporated verbatim into 39 U.S.C. § 404(d)(1) by the Postal Accountability and Enhancement Act of 2006.<sup>6</sup> Consequently, the Commission’s reasoning and conclusions on the applicability of section 404(b)(1) to the Knob Fork CPO are applicable to the Alplaus CPO. The Postal Service’s Motion fails to address Commission precedent and reasoning in Knob Fork as it applies to the Alplaus CPO, and therefore should be dismissed.

With respect to policy concerns, the Postal Service asserts that the “procedures of 39 U.S.C. § 404(d) are not compatible with the requirements of contract management, negotiation and implementation.” Motion at 5. The Postal Service then conjures up all sorts of troubling contractor behaviors. *Id.* at 5-6.

The Postal Service’s arguments lack merit and, in some cases, strain credulity. Concerning implementation, the Postal Service argues that “a CPO operator could prevent the Postal Service from satisfying section 404 by refusing to cooperate, or it could extort money from the Postal Service in exchange for cooperation.” *Id.* at 5 – 6. Apparently, the Postal Service is suggesting that it is without recourse in securing

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<sup>5</sup> *Id.* The Commission’s quote is not cited in the original; however, see 39 U.S.C. § 404(b)(5)(B).

<sup>6</sup> Public Law 109-435, December 20, 2006.

contractor performance. This seems implausible, since the Postal Service could delay or make partial payment, or make no payment at all, on the contract or, in the extreme, suspend or terminate the contract for cause—in effect, achieving the very end that the Postal Service claims the contractor wants to avoid by dragging its feet or using extortion.

Similarly, the Postal Service's claim that its ability to negotiate reasonable contractual terms would be harmed is not credible. The Postal Service does not specify what reasonable contractual terms would be threatened if a CPO is covered by section 404(d). More importantly, for very small communities, the Postal Service's willingness to establish a CPO means a stable source of income and a reliable stream of customers (and possibly additional revenue) for an existing business, such as a general store, hardware, or gas station. No potential contractor in such a community is likely to jeopardize this steady source of income and revenue by objecting to necessary contract terms requiring information in the event the CPO is closed and subsequently appealed pursuant to section 404(d).<sup>7</sup> In larger communities, there are likely to be more than one potential contractor willing to negotiate, permitting the Postal Service to conclude a contract with the most favorable terms that cover the need for information with respect to a future Final Determination.

Finally, the Postal Service asserts that “the Commission[ ] would essentially become a party to contract negotiations, injecting more complexity into the contract negotiation process.” Motion at 5. The Postal Service's assertion is fanciful. To the extent the Commission concludes (again) that section 404(d) is applicable to CPOs, the Postal Service will simply have to ensure that its contracts specify performance by the contractor concerning the provision of information necessary for the Postal Service to fulfill its obligations under the statute. Such information would include some of the most

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<sup>7</sup> The importance of the Postal Service's economic presence to one small community is evident in the comments of a Petitioner who expresses concern about the loss of income for an all-volunteer fire department resulting from the closure of a post office located in a leased facility built and owned by the fire department. Initial Brief of Petitioner, Docket No. A2012-5 (Conception Junction Post Office), at 2.

basic information necessary for the Postal Service to operate its business on a daily basis, including the number of post office box customers, rural route delivery customers, and hours of operation per week during which retail customers may obtain service. Postal Service's claims as to "more complexity" are not supported in its Motion.

### CONCLUSION

The Public Represent respectfully submits the foregoing and requests that the Commission deny the Postal Service's Motion to Dismiss and review the decision to close the Alplaus CPO on its merits.

Respectfully Submitted,

s/ James F. Callow

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